FILED

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an accused who is subjected to custodial interrogation is denied his rights under the Fifth and Fourteenth Amendments to the United States Constitution when the police fail to terminate the interrogation following his unambiguous assertion of his right to counsel?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

COMMONWEALTH OF PENNSYLVANIA

Petitioner

V.

ROBERT PETER ZOOK, JR.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Robert Peter Zook, Jr., Respondent, requests that this Court deny the Petition for Writ of Certiorari filed by the Commonwealth of Pennsylvania in this Court on or about June 7, 1989.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States.

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

SUMMARY OF ARGUMENT

The Commonwealth's Petition for Certiorari should be denied. During custodial interrogation, the Respondent clearly asserted his right to counsel when he asked if he could use the phone to call his mother to see if she could get him an attorney. Under Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880 (1981) police were required to terminate the interrogation. By continuing to question the Respondent the police violated the rights guaranteed him by the Fifth and Fourteenth Amendments to the Constitution.

The decision of the Pennsylvania Supreme Court finding a clear assertion by the Respondent of his right to counsel and a violation of Edwards v. Arizona was in conformity with the established precedent of this Court. Since there was no ambiguity or equivocation in the Respondent's assertion of his rights there is no need for this Court to address the question left open by Smith v. Illinois, 469 U.S. 91, 83 L.Ed.2d 488, 105 S.Ct. 490 (1984) concerning the effect of an ambiguous assertion by an accused of his right to counsel.

ARGUMENT

The Commonwealth's Petition for Certiorari should be denied since the decision of the Pennsylvania Supreme Court in this case is controlled by this Court's decision in Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880 (1981).

In Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), this Court determined that the Fifth and Fourteenth Amendments required that custodial interrogation be preceded by advice to the accused that he had the right to remain silent and the right to the presence of an attorney. Miranda also provided that if an accused requests counsel "the interrogation must cease until an attorney is present." Id. at 474, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966). In Edwards v. Arizona, this Court specifically held that:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available.

Id., 451 U.S. 477, 484, 68 L.Ed.2d 378, 386, 101 S.Ct. 1880.

Edwards v. Arizona articulated a prophylactic rule designed to protect an accused in custody from being badgered by police officers. Oregon v. Bradshaw, 462 U.S. 1039, 1044, 77 L.Ed.2d 405, 411, 103 S.Ct. 2830 (1983). The prophylactic

approach constitutes a "bright line rule" that all questioning must cease after an accused requests counsel. Smith v. Illinois, 469 U.S. 91, 98, 83 L.Ed.2d 488, 495, 105 S.Ct. 490 (1984). The Edwards v. Arizona rule is based on the understanding that the assertion of the right to counsel is a significant event and that additional safeguards are necessary when the accused asks for counsel. Michigan v. Jackson, 475 U.S. 625, 636, 89 L.Ed.2d 631, 642, 106 S.Ct. 1404 (1986).

Edwards v. Arizona embodies two distinct inquiries, First, the Court must determine whether the accused actually invoked his right to counsel. Second, if the right to counsel is invoked the courts may admit his responses to further questioning only on finding that he (a) initiated further discussion with the police, and (b) knowingly and intelligently waived the right he had invoked. Smith v. Illinois, supra at 469 U.S. 95, 83 L.Ed.2d 493-494, 105 S.Ct. 490.

In the present case, Respondent was arrested for the murders of Paul Conard and Sandy Wiker. Subsequent to his arrest Respondent was given his Miranda warnings by Lieutenant Michael Landis of the Lancaster City Police Department.

Respondent waived his rights and agreed to talk with the police. Lieutenant Landis proceeded to question the Respondent concerning the offenses. During this interview the Respondent steadfastly maintained his innocence. Not being satisfied with these responses Lieutenant Landis confronted the Respondent with certain inconsistencies in his statement in an apparent effort to obtain a confession. Approximately two-thirds of the way through the interview

the Respondent "asked if he could use the phone to call his mother to see if she could get him an attorney." At the time of that request Edwards v. Arizona and Smith v. Illinois mandated that the police immediately cease questioning the Respondent. In this case however Lieutenant Landis never honored the Respondent's request for counsel and instead asked the Respondent if he meant that the police should stop questioning him until an attorney was present. This was in direct contravention of the rule of Edwards v. Arizona.

Respondent disputes the Commonwealth's contention that his request for counsel was ambiguous and equivocal. The prior decisions of this Court have given broad effect to requests for counsel that are less than all-inclusive. Connecticut v. Barrett, 479 U.S. 523, 529, 93 L.Ed.2d 920, 928, 107 S.Ct. 828 (1987). See e.g. Oregon v. Bradshaw, 462 U.S. 1039, 1041-1042, 77 L.Ed.2d 405, 410, 103 S.Ct. 2830 (1983)("I do want an attorney before it goes very much further."); Edwards v. Arizona, supra, 451 U.S. at 479, 68 L.Ed.2d at 382, 101 S.Ct. 1880. ("I want an attorney before making a deal.")

Respondent's assertion of his right to counsel was not ambiguous or equivocal. Respondent was arrested for a double homicide. Subsequently, he was advised of his rights and subjected to custodial interrogation. In his questioning, Lieutenant Landis confronted the Respondent with what he perceived were inconsistencies and weaknesses in the Respondent's exculpatory statements. In reaction to this, the Respondent asserted his right to counsel when, in the words of Lieutenant Landis, "he asked if he could use

the phone to call his mother to see if she could get him an attorney."

In determining whether there was any ambiguity in the Respondent's request this Court should examine the context in which it was made. Respondent was being subjected to custodial interrogation concerning two homicides. In this confrontational environment the Respondent desired to exercise his right to counsel. His assertion did not include the precise language that would have been used by a lawyer or a judge. Nevertheless, there can be no doubt as to the meaning of this request. Respondent desired counsel and his statement was a direct attempt on his part to articulate his intention.

There can be little doubt that the Respondent desired to speak with an attorney when he interrupted the interrogation and in a statement that was not responsive to any question indicated his desire to speak with his mother to see if she could obtain counsel for him.

The Commonwealth fragments Respondent's request in an attempt to render it ambiguous. The Court should reject this strained and hypertechnical interpretation. An ambiguity arises only when the Respondent's words understood as ordinary people would understand them are ambiguous. Connecticut v. Barrett, supra.

Respondent disagrees with the Commonwealth's assertion that the Pennsylvania Supreme Court implicitly followed a minority rule "that all questioning must cease upon any request for, or reference to counsel, however equivocal or ambiguous." (Petition for Certiorari, p. 7).

To the contrary the Pennsylvania Supreme Court specifically found that the Respondent "clearly invoked his rights under Miranda to secure counsel." Commonwealth v. Zook, ____ Pa. ____, 553 A.2d 920, 923 (1989).

In its Petition for Certiorari, the Commonwealth makes reference to the Pennsylvania Supreme Court's decision in Commonwealth v. Gibbs, ____ Pa. ____, 553 A.2d 409 (1989), cert. pending. This case should not rise or fall on the disposition by this Court of the Gibbs case. Gibbs is clearly distinguishable since it involved a response to the Miranda warnings which could be construed as ambiguous. ("Maybe I should talk to a lawyer. What good would it do me to tell you?") Further, the Pennsylvania Supreme Court based its decision on a finding that the police made an impermissible inducement and there was no finding that the rule of Edwards v. Arizona was violated.

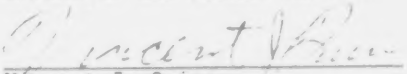
Since the police refused to terminate questioning following the Respondent's assertion of his rights, the rule of Edwards v. Arizona, required that the Respndent's statement be suppressed. The Pennsylvania Supreme Court was justified in finding a violation of Edwards v. Arizona and in reversing the judgment of the trial court and remanding for a new trial.

The decision of the Pennsylvania Supreme Court was in conformity with well-settled law as articulated by this Court in Edwards v. Arizona and Smith v. Illinois. Since the Respondent's request was neither ambiguous nor equivocal this Court will not have the opportunity in this case to address the effect of an accused's ambiguous assertion of his constitutional rights.

CONCLUSION

Respondent requests that the Commonwealth of Pennsylvania's Petition for Certiorari be denied.

Respectfully submitted,
OFFICE OF THE PUBLIC DEFENDER

BY: 

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PROOF OF SERVICE - AFFIDAVIT

I, Vincent J. Quinn, Attorney for Robert Peter Zook, Jr., Respondent herein, deposes and says that on the 29th day of June, 1989, I served a copy of the foregoing Respondent's Brief in Opposition to Petition for Certiorari on Joseph C. Madenspacher, First Assistant District Attorney, Attorney for the Petitioner, Commonwealth of Pennsylvania by delivering the same to him personally in the Offices of the District Attorney for Lancaster County, located in the Courthouse, Lancaster, Pennsylvania.

OFFICE OF THE PUBLIC DEFENDER

BY: Vincent J. Quinn

Vincent J. Quinn
Chief Public Defender
Attorney I.D. 26113
Attorney for Respondent

Sworn to and subscribed before
me this 29th day of June, 1989.

Susan W. Myers
Notary Public

NOTARIAL SEAL
Susan W. Myers, Notary Public
Lancaster City, Lancaster County
My Commission Expires 10/8/91

IN THE SUPREME COURT OF THE UNITED STATES

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PROOF OF MAILING - AFFIDAVIT

I, Vincent J. Quinn, Attorney for Robert Peter Zook, Jr., Respondent herein, whose application for admission to the Bar of the Supreme Court of the United States is presently pending, hereby certifies that on the 30th day of June, 1989 I deposited in the United States Post Office located in Lancaster, Pennsylvania, with first class postage prepaid and properly addressed to the Clerk of the Supreme Court of the United States within the time allowed for filing the foregoing Respondent's Brief in Opposition to Petition for Certiorari.

OFFICE OF THE PUBLIC DEFENDER

BY: Vincent J. Quinn

Vincent J. Quinn
Chief Public Defender
Attorney I.D. 26113
Attorney for Respondent

Sworn to and subscribed before me this 29th day of June, 1989.

Susan W. Myers
Notary Public

NOTARIAL SEAL
Susan W. Myers, Notary Public
Lancaster City, Lancaster County
My Commission Expires 10/6/91